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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 432

MORAND BROTHERS BEVERAGE CO., SAM CASSEL COMPANY, CRESCENT WHOLESALE LIQUORS, INC., CONTINENTAL DISTRIBUTING CO., INC., JUDGE & DOLPH, LTD., KUSPER OLD FORT DEARBORN CO., NATIONAL WINE & LIQUOR CO., INC., OLD GOLD DISTRIBUTORS, INC., PIONEER ATLAS LIQUORS, INC., SOUTH SHORE LIQUORS, INC., UNION LIQUOR CO., INC., METROPOLITAN LIQUOR COMPANY, SOUTH SIDE CENTRAL LIQUOR DISTRIBUTORS, INC., CENTRAL LIQUOR DISTRIBUTORS, INC., STAR LIQUORS, INC., BLUE ROSE LIQUOR CO., INC., CASEY & EVANS, INC., GERSHUNY & EPSTEIN, INC., INTER-NATIONAL LIQUOR CO., OLD CASTLE DISTRIBUTORS, INC., STANDARD LIQUORS, INC., UNIVERSAL WINE & LIQUOR CO., THE UNIVERSAL LIQUOR COMPANY, INC., WINDY CITY LIQUOR DISTRIBUTORS, INC., NATIONAL CORDIAL CO., INC., SAM FRIEDMAN, LENA FRIEDMAN, SIDNEY FRIEDMAN, MEYER SMITH, MAE SMITH, HYMAN SMITH, and ROSE H. SMITH, Individually and d/b/a CAPITOL WINE & LIQUOR CO., JOHN L. PICONI and NENO BRANCHINI, Individually and d/b/a CITY WINE & LIQUOR CO., ANGELO FANTOZZI, STELLA FANTOZZI, GINO DEL DOTTO and LOUIS DEL DOTTO, Individually and d/b/a FANTOZZI & CO., ABRAHAM COOPER, IDA COOPER, RUFUS COOPER and DESMOND ROSEN, Individually and d/b/a WEST SIDE WHOLESALE LIQUOR DISTRIBUTOR, DESMOND ROSEN, ABRAHAM COOPER, IDA COOPER and MAX COOPER, Individually and d/b/a MERCHANTS LIQUOR DISTRIBUTORS, JACK HOLT and GEORGE MARCUS, Individually and d/b/a HOL-MAR CO., OSCAR LEVY d/b/a LA SALLE WINE & LIQUOR CO., HARRY WEINSTEIN and JOSEPH WEINSTEIN, Individually and d/b/a ROSELAND LIQUOR CO.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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LOUIS A. KOHN,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners herein, by Leo F. Tierney, Louis A. Kohn, Stuart Bernstein, and Francis W. Collopy, their attorneys, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 28, 1953, and the decree in conformity with that judgment entered June 26, 1953.

OPINIONS BELOW.

The initial decision and order of the National Labor Relations Board (R. I-45)[1] is reported at 91 N. L. R. B. 409. The initial opinion of the Court of Appeals (R. I-

[1] The Appendix to Petitioners' Brief in the Court of Appeals in the first proceeding, No. 10335, is herein referred to as R. I, and the Appendix in the second proceeding, No. 10727, is referred to as R. II.

495) is reported at 190 F. 2d 576. The supplemental decision and order of the National Labor Relations Board (R. II-49) is reported at 99 N. L. R. B. No. 55. The second opinion of the Court of Appeals (R. II-878) is reported at 204 F. 2d 529.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 28, 1953 (R. II-890), and its Supplemental Decree was entered on June 26, 1953. (R. II-891.) Time for petitioners to file this Petition was extended to October 24, 1953. (R. II-foll. 906.) The jurisdiction of this Court is invoked under 29 U. S. C. §§ 160(e) and (f), and 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The pertinent statutory provisions are Sections 7, 8(a)(1), 8(a)(3), 10(c), 10(e) and 10(f) of the National Labor Relations Act (hereafter called the "Act"), being 29 U. S. C. §§ 157, 158(a)(1), 158(a)(3), 160(c), 160(e) and 160(f), and are printed in Appendix A, *infra*, p. 25.

STATEMENT OF THE CASE.

Introductory.

This case is one of two[2] which have recently reached Courts of Appeals raising the ultimate issue whether employers in a multi-employer bargaining unit may take defensive action against their employees when strike action after a bargaining impasse is taken against only one employer of the multi-employer unit.

The significance of this issue is evidenced by the volume of comment on this problem generally and on this case specifically during the course of its tortuous journey

2. The other is *Leonard* v. *N. L. R. B.*, 205 F. 2d 355 (C. A. 9, 1953).

through the Board and Courts.[3] That practitioners in the field as well as the commentators recognize the importance of the problem is evidenced by the intervention of employer and labor groups as *amici curiae* in the Court of Appeals.[4]

This wide-spread interest is no doubt due to the rising incidence of bargaining on the basis of multi-employer units. The Bureau of Labor Statistics has reported that in 1947 approximately 4,000,000 workers were covered by agreements negotiated between trade unions and groups of employers, and that this number had risen to an estimated 5,000,000 workers by 1951.[5] The percentage of employees subject to such agreements varies from a high of 71% in the Pacific Region to a low of 7% in the East South Central Region.[6] The National Labor Relations Board (hereafter called the "Board") has stated that the uniformity and stability of labor conditions resulting from this

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3. See Appendix B, *infra*, p. 29. The Board has itself recognized the importance of the problem in a letter written by its chairman to the Court of Appeals after the Court's second opinion. See Appendix C, *infra*, p. 31.

4. Labor groups which filed *amici* briefs were American Federation of Labor; International Brotherhood of Teamsters; Chauffeurs, Warehousemen and Helpers of America; Bakery and Confectionery Workers International Union of America; Retail Clerks International Association; and Liquor and Wine Salesmen's Union, Local 62, Affiliated with Distillery, Rectifying and Wine Workers International Union of America.

Employer groups were Union Employers Section, Printing Industry of America, Inc.; San Francisco Employers Council; Chicago Bakery Employers Labor Council; Seattle Department Stores Association; and National Beer Wholesalers Association of America. R. I. 492-94.

5. Collective Bargaining with Associations and Groups of Employers, B. L. S. Bulletin No. 897, U. S. Dept. Labor (1947); Collective Bargaining Structures: The Employer Bargaining Unit, B. L. S. Report No. 1, U. S. Dept. Labor (1953).

6. Collective Bargaining Structures: The Employer Bargaining Unit, *supra* n. 5, at p. 12.

form of bargaining has been found to be beneficial and desirable.[7]

One of the more critical questions presented by this bargaining form is the extent to which the multi-employer unit can retain its integrity in the face of strike action, after a bargaining impasse, against only one employer or a small group of employers in the multi-employer unit.[8] This device of striking only part of the unit and then moving on to another small segment has been termed "whipsawing". The Union can exert almost irresistible pressure on a single employer who finds his fellow members of the multi-employer unit—who are also his business competitors—gathering his market, while the Union can support the small part of its membership which is on strike almost indefinitely. Unless the multi-employer group may exert counter-pressure the strike action must always be successful.[9]

This case has been twice before the Board and twice before the Court of Appeals. Six opinions (not including one dissenting Board opinion) have been written on the merits of the arguments and the weight of the evidence—two each by the Trial Examiner, the Board and the Court of Appeals. Clashes between the respective functions of administrative agency and reviewing court have developed. The record is now over 1400 pages long. In the progress of this case from charge filed to this Petition, issues have

7. See *Rayonier Incorporated*, 52 N. L. R. B. 1269, 1273-74 (1943). See also *The Multi-Employer Lockout*, 3 Utah L. Rev. 122, 125 n. 22 (1952). It has also been said to have become a defensive technique for small businessmen against the demands of strengthened unions. *Multi-Employer Bargaining and the National Labor Relations Board*, 66 Harv. L. Rev., 886, 886-87 (1953).

8. See Littler, The Right To Lockout, Section of Labor Relations Law, 1952 Proceedings American Bar Association 4, 6 (1952).

9. The technique is described in *Leonard* v. *N. L. R. B.*, 205 F. 2d 355, 356 (C. A. 9, 1953) and in *Whipsawing in Multi-Employer Bargaining*, 3 Stanford L. Rev. 510 (1951).

been raised, dropped and obscured. Because of the length of the record and involved metamorphosis of this litigation, this Statement of the Case will be longer than that which might ordinarily be appropriate, and the indulgence of the Court is respectfully requested.

Background of Dispute.

Petitioners are wholesale distributors of alcoholic beverages in Chicago, Illinois. During the pertinent period they were all members of either the Illinois Wholesale Liquor Dealers Association (hereafter called the "Illinois Association") or the Chicago Wholesale Liquor Dealers Association (hereafter called the "Chicago Association"). The exclusive collective bargaining agent for all salesmen of petitioners was the Liquor and Wine Salesmen's Union, Local 62, Distillery, Rectifying and Wine Workers' International Union of America, A. F. L. (hereafter called the "Union"). Since 1942, collective bargaining had been carried on between the Union and representatives of the Associations. Agreements reached were subject to approval by a majority of the members of the Associations, and after approval separate but identical contracts were executed by each member. (R. I-79-80, 236-42.)

Negotiations for the 1949 contract started early that year, following the established pattern of bargaining on behalf of the petitioners by the Associations. An impasse was reached on the issue of increase in salesmen's commissions and the 1948 contract, due to expire on January 31, 1949, was extended by agreement between the Union and the Associations to March 15, 1949. (R. I-475.) By March 15, 1949 the impasse had not been broken, and on the following day the Union sent a "second supplemental agreement" to each of the members of the Associations, incorporating the Union's last offer, with a letter stating

that it was imperative that the enclosed supplement be executed without further delay. (R. I-478-81.)

None of the members of the Associations executed this supplement, and on March 19, 1949 the Illinois Association reminded the Union that negotiations had always been conducted on an industry-wide basis, and that since the supplement was not approved by the Associations it would not be executed. (R. I-481-2.)

Later that month the Union membership, which included all salesmen of all petitioners (R. I-226-27), unanimously voted general strike authorization. (R. I-209-10.) Petitioners, learning that the Union contemplated striking less than all the petitioners, prepared in blank a letter which it intended to send to all salesmen in the event one petitioner or small group should be struck. (R. I-164, 165, 180-81, 380-81.) This proposed letter stated that negotiations had always been conducted on an industry-wide basis, that a strike against one house was a strike against all, that the Union was advised of this position, and that since the salesmen of the Union walked out on one house the employers regarded this as a decision to strike every employer who had been a party to industry-wide negotiations; accordingly, the letter continued, the salesmen were asked to turn over immediately any records, papers, credentials or monies they had belonging to the employers, and to see the employers to settle any financial differences that might have existed.[10]

Negotiations continued, and on about April 4 the counsel for the Illinois Association informed the attorney for the Union that the letters were going out if the Union carried through its threat to strike one house. (R. I-384, 390-91.) The following day, April 5, the Union wrote to

10. This letter is reproduced in full in the first opinion of the Court of Appeals. R. I-497.

all members of the Association, other than Old Rose Distributing Co. (hereafter called "Old Rose"), that it would be erroneous to interpret a strike against one as a strike against all. (R. I-466.)

The day after the mailing of that letter the Union struck Old Rose, a member of the Illinois Association. (R. I-112.) After the Association members heard the recorded conversation of the Union president with an official of Old Rose, in which the Union stated that the strike arose out of general contract negotiations and not for reasons peculiar to Old Rose, the Association membership unanimously voted to send the letter (hereafter referred to as the "April 7 letter") to all salesmen. (R. I-364-65.) This letter was sent to all salesmen of every petitioner. (R. I-112-13.) The salesmen were out from April 8 to about May 1, at which time all but one of approximately 800 returned to work. (R. II-79, 888.)

First Board Proceeding.

Upon charges filed by the Union, the Board on May 4, 49 ~~1952~~ issued its complaint charging discrimination in violation of Section 8(a)(3) of the Act, and interference in violation of Section 8(a)(1) of the Act. (R. I-413, 428.)

Evidence at the first hearing showed that salesmen, after receiving the April 7 letter, considered themselves "discharged," "fired," "through," "locked-out," "no longer employed," and "their services no longer required." (R. I-143, 159, 169, 176, 179, 191.) Salesmen picketed, carrying signs reading "Locked-out and discharged." (R. I-173.) The salesmen indicated no serious effort was made to obtain employment elsewhere. (R. I-206, 213-14, 221, 223.) None was replaced by his employer. (R. I-504.) The Trial Examiner found that the Old Rose employees—the initial strikers—were "discharged" since the letter of April 7 was sent them also, and that all other salesmen were "locked-out", that such action was in violation of

Sections 8(a)(1) and 8(a)(3) of the Act, and recommended an award of back pay for all salesmen, including the Old Rose employees. (R. I-84, 87-88.) The Board stated that it accepted the findings of the Trial Examiner and stated that all salesmen were "discharged" in violation of the Act (although that was not the finding of the Trial Examiner), but held that back pay should be awarded to all employees other than the Old Rose salesmen; that the Old Rose salesmen, being strikers, were not entitled to back pay unless they unconditionally requested reinstatement during the strike. (R. I-47, 58 n. 19.)

Court's First Opinion.

On review of this order, on cross-petitions by the Board for an enforcement decree and by petitioners to set aside the Board order, the Court of Appeals stated that the petitioners—

> "* * * could quite properly and realistically view the strike, as they did, as a strike which, though tactically against but one petitioner, was, in the strategic sense, a strike against the entire membership of their Associations, aimed at compelling all of them ultimately to accept the contract terms demanded by the Union. It follows that they had a right to counter the strike's effectiveness by laying off, suspending or locking out their salesmen, who were members of the striking union and as to whom there was not then in effect any collective bargaining agreement." (R. I-503.)

The Court recognized that the Board did not share its view with respect to the validity of the use of the lockout in this circumstance, the Board already having expressed a contrary view in another proceeding. (R. I-503 n. 4.)

The Court concluded that although a lockout or temporary severance of employment would be valid, a permanent severance would be unlawful, since permanent discharge for strike activities has long been held to be unlawful. (R. I-504.) The Court granted enforcement of the

order of the Board with respect to Old Rose, pointing out that the Trial Examiner apparently did not consider that the Old Rose salesmen were merely laid off or locked out since they were already on strike when the April 7 letter was mailed to them. (R. I-505 n. 5, 506.) Old Rose complied with that order which was limited to posting of notices. All its salesmen had already gone back to work, no back pay being awarded as there was no evidence of an unconditional request for reinstatement during the strike. Old Rose is thus no longer a party to this proceeding. With respect to the salesmen of the petitioners, the Court found there was no clear finding whether the severance was temporary or permanent—the Board stating that it agreed with the Trial Examiner that the severance was a "discharge" while the Trial Examiner had described the severance as a "lockout". (R. I-505.)

The Court therefore remanded the case to the Board, directing "that it make a clear and explicit finding on the question whether the severance of the employer-employee relation between the various petitioners (other than Old Rose) and their respective salesmen was intended to be temporary or permanent and, if intended to be temporary in character, in view of the Board's further consideration, whether it was made for the purpose of 'interfering or coercing employees in the rights guaranteed to them by Section 7' or as a legitimate exercise of petitioners' economic remedies; and, if permanent, whether, in the light of the principles announced in this opinion, a back pay award would tend to effectuate the policies of the Act." (R. I-505-6.) Upon motion by petitioners, the Court ordered the Board to hear and receive additional evidence on the remanded questions. (R. I-507.)

Board Proceedings on Remand.

Thereupon a second hearing was held before the same Trial Examiner who conducted the original hearing. The

petitioners introduced evidence that their intention was not to sever permanently the employment relationship (R. II-113, 250, 283, 315, 433, 454, 486); that the salesmen's names or identity by code number were retained on invoices during the course of the strike (R. II-113-14, 190, 263, 283, 310); that no effort was made to replace salesmen during the course of the strike (R. II-250, 263, 280, 283, 301, 458); that employee eligibility on insurance plans was maintained during the strike, premiums being paid either by advances by the employer or from deductions previously made. (R. II-188-89, 258, 300-01, 316, 455, 557-58, 561-62, 758-60.) The Board's evidence consisted of statements of various parties that the salesmen were "fired," "dismissed," "discharged," or "through." (R. II-365, 381, 392, 414.) The Board, by again resorting to such ambiguous terminology, disregarded the remand order which was to determine whether the severance was "permanent" or "temporary." Evidence was introduced that when a salesman was permanently severed in the past he was ordered to turn in his books and records (R. II-336, 369), from which it was argued that the request in the letter of April 7 to turn in records meant discharge. (R. II-52.) Yet, one of the salesmen who testified that turning in books and records meant discharge also stated that he came back to work without being asked to do so when he heard the strike was over. (R. II-343.)

The Board also introduced as a witness Allen Schultz, the then attorney for the Chicago Association, who testified that it was the intent of the employers to create a "legal discharge" but not a "lockout" which was thought to be unlawful. (R. II-224-25.) Counsel for petitioners was denied the opportunity to determine what the witness understood a "lockout" or "legal discharge" to be. (R. II-238-39.) This witness also testified as to the crucial

issue of permanence that he did not know whether it was the intention of petitioners to take the men back when the strike was over. (R. II-228.) The record indicates hostility had arisen between this witness as counsel for the Chicago Association, and the Illinois Association, and that the witness had urged separate settlement with the Union. (R. II-417-19, 453.) Members of the Chicago Association testified for the petitioners that there was no talk of "legal discharge" or "lockout" by Schultz. (R. II-453-54, 473-74.) An attorney for the Illinois Association denied the terms "legal discharge" or "lockout" were used by Schultz. (R. II-483-84.)

The Trial Examiner, without making express determinations of credibility or resolutions of any testimonial conflicts, found that the employers intended the severance to be temporary, and only for the duration of the disagreement. (R. II-82.)

The Board reversed this finding of the Trial Examiner and found the petitioners intended to create a permanent discharge. (R. II-64.) Although claiming to accept all resolutions of credibility made by the Trial Examiner (R. II-51), the Board reversed the only determination that was peculiarly within the competence of the Trial Examiner, depending so much, as it did, on the impression gained by the trier-of-facts from the demeanor or conduct of the witnesses. The Board rejected as "self-serving" and "inherently unreliable" the declarations of the petitioners that they intended to take back all the salesmen (R. II-53, 57), and relied on the testimony of Allen Schultz (R. II-54-57), and the return of books and records argument. (R. II-52.) There was no attempt to make specific findings on the nature of the discharge with respect to the "various petitioners * * * and their respective salesmen." (R. I-505-6.)

The Board went further. Despite the clear holding of

the Court of Appeals, it took issue with the Court on the validity of the temporary severance, even after it had found the severance here to be permanent. (R. II-64-72.)

Court's Second Opinion.

The Court of Appeals, on review of the order of the Board issued pursuant to the remand (again on cross petitions of the Board and petitioners), severely chastised the Board for ignoring the "law of the case" as laid down by a superior tribunal.[11] The Board violated this basic tenet by its "express disapproval of our prior opinion," which "implies an attitude on the part of these members [of the Board] to have their ultimate judgment that petitioners had engaged in unfair labor practices recognized in any event." (R. II-882-85.)

However, on the review of the finding of the Board that the severance was permanent, the Court said that it was "not prepared to say that the evidence relied upon by the Board, together with the reasonable inferences available therefrom, was not substantial and adequate." The Court indicated an awareness that the findings of the Trial Examiner could not be completely ignored, but did not indicate what, if any, weight the contrary finding of the Examiner on the issue of permanence of severance was accorded in its decision to affirm the Board on this question.

The Court again noted the ambiguous character of the various terms such as "discharge," "lay-off," "legally discharged," "fired" and "dismissed," and phrased the issue more precisely as whether the employers intended that upon the cessation of the strike, the salesmen would be automatically reinstated or whether it would be necessary for them to reapply for employment. (R. II-887.)

11. The Board, in a subsequent letter to the Court, explained its action in this regard as a "preservation of its position for eventual review." See Appendix C, *infra*, p. 31.

However, despite this precise delineation of the issue, the Court did not appear to weigh the evidence in the light of this statement. In fact, there was no evidence that any employee of the hundreds returning to work had to apply for re-employment, and at least one stated he returned without ever having been asked to return by his employer. (R. II-343.)

The Court summarily affirmed the award of back pay as being a matter within the discretion of the Board. (R. II-889.)

QUESTIONS PRESENTED.

1. Whether the Board abused its discretion by the award of back pay under the following circumstances to employees held to have been unlawfully discharged: employees were all members of a Union which bargained on their behalf with a multi-employer bargaining group; after a bargaining impasse, strike action was taken directly against only one employer of the multi-employer group; the Court below affirmed the Board's finding that the employers' defensive action against such strike constituted a permanent discharge of all employees, the Court having previously held that under these circumstances the employers could have temporarily discharged all employees for the duration of the strike since the strike was against all employers of the group; such discharge was held to have been permanent even though all employees were taken back on the termination of the dispute; back pay was not awarded to the initial strikers but to all other employees.

2. Whether the Court of Appeals correctly applied the principles of *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951), in the weight it accorded the Trial Examiner's finding that the employers intended a tempo-

rary severance, and whether its action in that regard conflicts with the decisions of other circuits.[12]

REASONS FOR GRANTING THE WRIT.

1. The Board action in awarding back pay disregarded established limitations on the use of this remedy and in effect nullified the holding of the Court of Appeals that a multi-employer bargaining group can take defensive action against an economic strike aimed at one member or a small part of the group; hence the award raises a question of extreme importance in the administration of the Act which should be authoritatively determined by this Court.

The Court, in its second opinion, affirmed the finding of the Board that the employers intended a permanent severance of the employment relationship, and approved the award of back pay as a routine discretionary matter for the Board. Although petitioners urge, as a second reason for granting this Petition, that the Court erred in its second opinion in not giving due regard to the finding of the Trial Examiner of a temporary severance, petitioners here argue that even if the discharge were permanent,

12. The ultimate issue implicit in this question is whether the Court below reviewed the findings of fact and conclusions of the Board in accordance with the statutory standard of substantial evidence on the record considered as a whole. Sections 10(e) and (f) of the Act (29 U. S. C. §§ 160(e) and (f)). Petitioners also desire to argue, in the event this Petition is granted, that, aside from the conflict in the Board and Trial Examiner findings, the evidence so preponderates in favor of a finding of temporary, rather than permanent, discharge, that even if the Trial Examiner and Board agreed the discharge was intended to be permanent the Court should have held such finding to be not supported by substantial evidence on the record considered as a whole; that the Court did not apply that standard but one ante-dating the 1947 amendments to the Act, relying as it apparently did on *N. L. R. B.* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292 (1939) (R. II-889) and that the Court therefore "grossly misapplied" the statutory standard. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 491 (1951). By this reference petitioners intend to preserve this Question.

back pay should not have been awarded. The Board ignored the novel aspects of the situation before it, thereby abusing its discretion, and the Court should have intervened in the face of such abuse. This argument proceeds from the premise that the employers could have lawfully taken action to defend against the "whipsaw", and although their action may have exceeded the limits set by the Court, yet the action in excess of that which was proper did not cause any loss of pay to the employees.

The Court of Appeals in its initial opinion held that, as a matter of law, the employers could have temporarily severed the employment of their salesmen, because they could "quite properly and realistically view the strike, as they did, as a strike which, though tactically against but one petitioner, was, in the strategic sense, a strike against the entire membership of their Associations." (R. I-503.) The Court, in its second opinion, further clarified this legal right of retaliatory action by stating that the severance could persist until the cessation of the strike (R. II-887)—this qualification being implicit in the first opinion.

The facts were that the salesmen returned to work as soon as the strike was terminated. Thus if the severance had been temporary—as the Trial Examiner found—there would have been no possible basis for a back pay award. There is no evidence that the employees suffered any greater loss of earnings because the severance was found to be permanent rather than temporary.

The Act permits the Board to direct affirmative action, including the award of back pay, "as will effectuate the policies of this Act." § 10(c), 29 U. S. C. § 160(c). The power of the Board, however, must be used to achieve the remedial objectives of the Act and is not punitive. *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 12 (1940).

Within the limits of the remedial objectives to be accomplished, the Board has broad discretion to fashion a remedy. But the limits must be observed—"The remedies must be functions of the purposes to be accomplished." *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346 (1953). The purpose to be accomplished in the award of back pay is the "restoration of the situation * * * which would have obtained but for the illegal discrimination" (*Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194 (1941)), or the reimbursement "for earnings lost by reason of the wrongful discharge" (*N. L. R. B.* v. *Gullett Gin Co.*, 340 U. S. 361, 363 (1951)). It must be shown that the illegal discrimination had a consequence measurable in monetary terms—loss of wages—which would not have occurred but for the discrimination. It is that consequence which the Board is authorized to rectify by an award of back pay.

In applying these principles the Board here took no account of the novel situation posed by the holding of the Court of Appeals in its first opinion. The Board assumed that, given a discriminatory discharge, the employees were deprived of their earnings solely because of that discharge. It is of course true that the conduct of petitioners' salesmen did not fit the usual pattern of strike activity —but doctrines evolved in the context of single-employer bargaining are not applicable to the situation here which is peculiar to multi-employer bargaining. The salesmen were all strikers, but not in the usual sense. In view of the fact that the employees could have been temporarily discharged as "strategic strikers" and thus deprived of their earnings, the question necessarily becomes whether the conduct of the employees as such "strategic strikers" and not the permanent discharge caused the loss of earnings. It was this crucial question which the Board did not consider.

The Board has long recognized that an unlawful discharge does not *per se* warrant the awarding of back pay.

Thus strikers who have been unlawfully discharged during the course of a strike are not awarded back pay unless and until it can be shown they unconditionally requested reinstatement. For, until that time "it cannot be established that the loss of pay was conclusively attributable to the employer's conduct." *Buzza-Cardozo*, 97 N. L. R. B. 1342, 1344 (1952); *Kallaher and Mee, Inc.*, 87 N. L. R. B. 410, 413 (1949). *In fact, in the present case, the Board refused to award back pay to the Old Rose salesmen for that very reason.* (R. I-58 n. 19.)

If the Old Rose salesmen were not entitled to back pay because their loss of wages during the strike period cannot be conclusively attributed to the employer, then consistent reasoning impels the conclusion that the loss of wages by the salesmen other than those of Old Rose is not attributable to the discharge, but to the strike which was held to have been against all employers. The loss of wages was induced by the salesmen, not by the employers.

The inconsistency between the treatment accorded by the Board to the Old Rose salesmen and all other salesmen clearly reveals that the Board has not accepted the ruling of the Court of Appeals that the strike against one employer was a strike against all. Having decided that the Old Rose salesmen were not entitled to back pay even though they were held to have been permanently discharged, the Board could have awarded back pay to the other salesmen only by denying that the strike was against all employers, thereby rejecting the "law of the case."

The holding of the Court of Appeals that the strike was a strike against all employers inevitably meant that all employees had to be treated in the same manner and that none had greater rights merely because the tactical approach of the Union required that one particular employer, rather than another, be struck first. The strategic

strike was against all employers, and the fact that the tactics called for an actual cessation of work by the salesmen of only one employer should give no greater legal rights to the other strategic strikers, nor should that subject the employers to differing degrees of liability. This the Court recognized in the first opinion when it asked the Board to consider, if the Board found the discharge to be permanent, "whether, in the light of the principles announced in this opinion, a back pay award would tend to effectuate the policies of the Act." (R. I-506.)

The Board refused to accept those principles; it refused to accept the ruling of the Court that a temporary discharge would have been lawful. It went out of its way to reject the principles, and having expressly rejected them obviously did not act upon them in considering the back pay issue.

The Court, in its second review of this case, did not follow the clear implications of its direction to the Board on the remand order to weigh the award of back pay in light of the principles of its first opinion. The Court briefly disposed of the back pay issue by stating that the question is a broad discretionary one for the Board, and must stand in the absence of a showing of a patent attempt to achieve ends other than those which fairly effectuate the policies of the Act. As we have demonstrated, the Board here made a patent attempt to frustrate the objectives of the Act. The Board expressly refused to follow the "law of the case" relating to the legality of temporary discharge as laid down by the Court of Appeals in its first opinion. In castigating the Board for this affront to its authority, the Court overlooked that the Board had indirectly accomplished through the award of back pay precisely what the Court recognized the Board members were attempting to do by their gratuitous attack on the

Court's first opinion—"to have their ultimate judgment that petitioners had engaged in unfair labor practices recognized in any event." (R. II-884.)

The Board has here disregarded established principles as to the award of back pay. It has made its award "without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act," and this the Board may not do. *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 349 (1953).[13]

If retaliatory action by multi-employer bargaining groups against the "whipsaw" is proper, then this award must fall. Back pay can be upheld only on the view that the Court of Appeals incorrectly held that a temporary severance would have been lawful. The important problems inherent in this vital area of labor-management relations should be resolved by this Court.

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2. The Court of Appeals, in failing to give due weight to the finding of the Trial Examiner that the severance was intended to be temporary and not permanent in its review of the contrary finding of the Board, departed from

13. Moreover, the Board and the Court disregarded certain equities present in the case. The petitioners argued in the first proceeding that the Union itself committed unlawful practices in violation of Sections 8(b)(1)(B) and 8(b)(3) by attempting to force one member of the bargaining unit to accept its last offer while trying to mislead the other members of the unit into believing that the strike against the one had nothing to do with the Association negotiations but was for reasons peculiar to Old Rose. The Court, in its first opinion, rejected this contention (R. I-500-3) and although petitioners have not included this issue in the questions here presented, they may desire to urge this point if the Petition is granted. Nevertheless, whether or not the Union's conduct was an unfair labor practice, it should have been considered by the court in determining the propriety of back pay. The power of the Courts to enforce orders of the Board "are equitable in nature and may be invoked only if the relief sought is consistent with the principles of equity." *N. L. R. B.* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64, 70 (C. A. 3, 1952).

the principles enunciated in Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 (1951). The decision below is also in conflict with recent decisions in other circuits following Universal Camera and is even inconsistent with a prior ruling of the Seventh Circuit itself.

In *Universal Camera,* this Court held that the Act evinces "a purpose to increase the importance of the role of examiners in the administrative process" and that reviewing courts should give to the examiner's report such probative force as it intrinsically commands. Findings of the Examiner which depend for their determination on the credibility of witnesses as shown by their demeanor or conduct at the hearing are entitled to greater significance. "The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case." 340 U. S. 474, 495-96.

It is apparent that the determination of the Trial Examiner that the intention of the employers in this case was to effect a temporary and not a permanent severance was one largely dependent on the credibility of witnesses. The appearance of petitioners as witnesses before the Trial Examiner was certainly an important factor to be considered in determining the weight to be accorded their testimony that they never intended a permanent discharge. Whether the various salesmen who testified they considered themselves "fired," "dismissed," "through," "discharged," or "locked-out" after receiving the April 7 letter from their employers understood these various terms to imply permanence of severance was also largely dependent upon their attitude upon the witness stand before the Trial Examiner. The testimony of Allen Schultz,[14] upon

14. The Board's evidence—particularly the testimony of Schultz—is analyzed and severely criticized by Petro, *The N. L. R. B. on Lockouts,* 3 Labor L. J. 659 (1952).

which the Board so strongly relied, would tend to take on a different meaning if heard directly than if read in the record. The Board characterized Schultz as one experienced in the field of labor relations and presumably familiar with the factual content of the terms he used. Yet perhaps his expertise was not as readily apparent to the trier-of-facts who observed his demeanor, may have considered the contradictions in his testimony, and weighed his testimony against the obvious conflict with that of other witnesses, including another attorney presumably as expert as Schultz. (R. II-479-85.) These instances are cited not to induce this Court to weigh the evidence, but rather to indicate that the finding of the Trial Examiner depended to a great degree, if not entirely, upon credibility and resolutions of testimonial conflicts.

However, the Court of Appeals gave no indication that any consideration was given by it to these factors beyond its naked assertion that "Added to all of this [petitioners' evidence] was the Examiner's finding of fact that the severance was intended to be temporary not permanent." (R. II-888.) The Court observed that the Board was of the opinion that the evidence preponderated in favor of a finding of permanent discharge, and that it was "not prepared to say that the evidence relied upon by the Board, together with the reasonable inferences available therefrom, was not substantial and adequate." (R. II-889.) Such assertion and observation does not appear to give to the Examiner's finding the consideration commanded by this Court in *Universal Camera*.

The disregard by the Court of the Trial Examiner's finding in this case is to be contrasted with the action of other courts when faced with a conflict in the findings of the Trial Examiner and Board. In each of these instances the Court, in following *Universal Camera*, rejected the finding of the Board and adopted that of the Trial Examiner.

Upon the remand of *Universal Camera*, the Court stated it should not be reluctant to insist that "an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded." *N. L. R. B.* v. *Universal Camera Corp.*, 190 F. 2d 429, 430 (C. A. 2, 1951).

Similarly, in *Ohio Associated Telephone Co.* v. *N. L. R. B.*, 192 F. 2d 664 (C. A. 6, 1951): "So viewing it, our judgment is that the examiner's finding with respect to the cause of discharges was, upon the whole record, based upon substantial evidence, unimpeached, and it was not in any way shaken by the Board's reasoning." Ibid., at 667. "We may not," the Court added at 668, "disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth."

In *N. L. R. B.* v. *Supreme Bedding & Furniture Mfg. Co.*, 196 F. 2d 997 (C. A. 5, 1952), the Board had stated that it accepted the findings of the Trial Examiner, but proceeded to reverse his determination that no unfair practice had been committed, much as the Board here stated that it accepted resolutions of credibility made by the Trial Examiner, and then reversed his finding which was so dependent on credibility. There the Court said:

> "Deprived of the support of the examiner's findings, its own findings indeed directly contrary to his, the Board is unable to make use of, the tributes to the perspicuity and the superior opportunities of the examiner, and the claims as to the binding force of his findings with which its briefs usually abound.
>
> "Instead, not denying *the examiner's superior opportunities to determine credibility,* its labors are directed to discrediting the examiner's determination as to the credibility of witnesses, where there is a conflict in testimony, and correctness of his apprehensions of, and inferences from the proven facts, where there is none." 196 F. 2d 997, 998.

The Court then weighed the findings of *both* the Board and Trial Examiner and concluded:

> "An examination of the record as a whole, in the light of these principles, leaves us in no doubt that the findings and recommendations of the examiner are, the findings and order of the Board are not, supported by it, and that the enforcement of the order should be denied." Ibid., 998-99.

The Seventh Circuit itself has recognized that where the Board has overruled the findings of a Trial Examiner, the reviewing court is charged with a greater duty under *Universal Camera* than that assumed by the Court in the instant case. In *U. S. Steel Co.* v. *N. L. R. B.*, 196 F. 2d 459 (C. A. 7, 1952), the Court analyzed the findings of the Examiner, then concluded that "The record as a whole supports the finding of the Trial Examiner * * * * We realize that the Board, upon reading the cold record, did not agree with the trial examiner's findings * * * but it was the examiner who had the opportunity to hear and see the witnesses." Ibid., at 467.

The action of the Court of Appeals in the instant case of merely reciting that the Trial Examiner had made a finding contrary to that of the Board, and then holding that it was not prepared to say that the evidence relied upon by the Board was not substantial and adequate, without first determining whether or not the Examiner's finding was not itself supported by even more compelling evidence, is completely contrary to what has been done by the Second, Fifth and Sixth Circuits and by the Seventh itself in the *U. S. Steel* case. It is manifestly apparent that the findings of the Trial Examiner were not accorded the respect they require under *Universal Camera.* The Court of Appeals has not given "a conscientious consideration of the entire record" and this should "invite review by this Court." *N. L. R. B.* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 503 (1951).

CONCLUSION.

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 23, 1953.

APPENDIX A.

Pertinent Excerpts From the National Labor Relations Act, 29 U. S. C. § 151, et seq.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3). [29 U. S. C. § 157.]

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * * [29 U. S. C. § 158 (a) (1), (3).]

SEC. 10. (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in

any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act. * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. [29 U. S. C. § 160 (c).]

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States, * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set

forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended. [29 U. S. C. § 160(e).]

SEC. 10. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the

relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. [29 U. S. C. § 160(f).]

APPENDIX B.

Freidin, The Taft-Hartley Act and Multi-Employer Bargaining, Industry Wide Collective Bargaining Series, Wharton School of Finance and Commerce (1948).

Garrett and Tripp, Management Problems Implicit in Multi-Employer Bargaining, Industry Wide Collective Bargaining Series, Wharton School of Finance and Commerce (1949).

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Somers, Pressures on an Employers' Association in Collective Bargaining, 6 Industrial & Labor Rel. Rev. 557 (1953).

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Multi-Employer Bargaining and the National Labor Relations Board, 66 Harv. L. Rev. 886 (1953).

The NLRB and Multi-Employer Units in a Competitive Economy, 43 Ill. L. Rev. 877 (1949).

Permissibility of Lock-Outs, Shut-Downs and Plant Removals, 50 Col. L. Rev. 1123 (1950).

The Multi-Employer Lockout, 3 Utah L. Rev. 122 (1952).

Employer Lockouts and Association-Wide Bargaining, 3 Labor L. J. 121 (1952).

Recent Case Comment, 65 Harv. L. Rev. 353 (1951).

APPENDIX C.

NATIONAL LABOR RELATIONS BOARD

June 26, 1953.

Honorable Walter C. Lindley, Judge,
United States Court of Appeals for
the Seventh Circuit,
Chicago, Illinois.

Re: Morand Brothers Beverage Co., *et al.*,
vs. N. L. R. B., No. 10727.

DEAR JUDGE LINDLEY:

On behalf of the Members of the Board I am writing to you, and to Judges Duffy and Swaim, concerning the position taken by the Board on the legal status of a lockout in its second decision in the above-entitled case. Since our sole concern is to explain, not to reargue, we think a letter may be more appropriate than a formal document in the litigation. Copies of this letter are nevertheless being sent to all parties in the case.

The Board Members are deeply concerned about the Court's observation that the Board's decision reflected a failure "to comply with the mandate" of the Court and evinced "an unwholesome outlook" incompatible with the role of court and agency in the administration of the National Labor Relations Act. While the Board might otherwise be disposed to accept this censure in silence, because it shares with others the usual doubt regarding explanations after the event, the gravity of the impeach-

ment and the Board's own continuing concern that it not overstep its administrative province impel this attempt at clarification. Particularly because, as the Court noted, I expressly did not join in that portion of the Board's decision which evidently disturbed the Court, I feel justified in expressing concern at the language in the Court's opinion.

The Board was aware that the Court's first opinion settled in this Court the question of the validity of an economic lockout, and it was not the Board's purpose in elaborating its contrary position on the remand to have the Court reexamine its holding and to enforce the Board's order on the ground previously rejected. Rather, the Board's purpose in elaborating its position—perhaps unhappily phrased—was to articulate a rationale suitable for review by the Supreme Court, should the occasion for it arise in this case. As matters stood after this Court's first decision, it was the Board's belief that the case was in an inchoate state not ripe for further review. The Board's first decision had been predicated on its finding that the employees had been discharged, and accordingly the Board had stated that "it is not necessary to pass on the question whether the [employers] were privileged to *lay off* their salesmen pending settlement of the contract dispute with the Local." *Morand Brothers Beverage Co.*, 91 N. L. R. B. 409, 410-411. The Court's first decision, however, resolved this legal question and remanded the factual question of discharge for further proceedings.

In this posture the Board believed that an immediate effort to secure Supreme Court review was inappropriate. The legal question decided by the Court had not yet been adopted by the Board in its findings as a basis for its decision in this case. Whether or not this alone should be decisive, it was conjoined with the fact that there still

remained open the narrower factual question which could conclusively terminate the case should the Board be persuaded, and should the Court agree, that the evidence supported a discharge finding. It seemed inopportune at this juncture, therefore, to ask the Supreme Court to pass forthwith upon an avoidable and difficult legal question. The upshot of the Board's thinking, accordingly, was that the better course was to determine the questions put by the Court in its remand order and to defer consideration of further review—which might prove unnecessary—until this Court's final disposition of every facet of the case.

Deferment of review of the legal question decided by this Court did not in the Board's view require its relinquishment in this case, in the sense that it could not thereafter be presented to the Supreme Court. The Board's thinking was influenced by the approach suggested by *Panama Railroad Co.* v. *Napier Shipping Co.*, 166 U. S. 280, 284, and *Hamilton Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 257-258. Hence, in order to preserve the opportunity for review by the Supreme Court in due course, but not for the purpose of urging its acceptance by this Court, the Board majority in its second decision, having previously reserved the question, now adopted as its position in this case the view that an economic lockout was invalid. It was only in connection with this preservation of its position for eventual review that the Board, speaking through my three colleagues,* elaborated its view regarding the invalidity of an economic lockout, the Board being of the opinion that it had not yet adequately articulated that position. In doing this the Board was primarily mind-

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* This was the Board action from which I dissented. Please note, however, preferably for correction in the Court's printed opinion, that only *three* (and not four) of my colleagues joined in the Board's majority opinion, as Member Peterson did not participate in the case at all.

ful that even on questions of law "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *S. E. C.* v. *Chenery Corporation*, 318 U. S. 80, 94.

The Board's conduct of the litigation in this Court on the remand was in fulfillment of this approach. As the Court noted in its opinion, neither in brief nor in oral argument did the General Counsel urge that the Court re-examine its earlier holding with respect to the legality of an economic lockout.

As I said at the outset, my primary purpose in writing the Court in this way is to convey the Board's deep distress that the Court has regarded the Board's conduct as an affront to its processes. Nothing could have been further from my colleagues' minds. I hope that this explanation of my colleagues' thinking will dispel this impression. For the Board's consistent endeavor has been and will continue to be, to adopt the Supreme Court's language, to perform our statutory duty with steadfast "regard to the appropriate function" of the Courts of Appeals in securing the "objects of the statute" through "co-ordinated action." *United States* v. *Morgan*, 307 U. S. 183, 191. It would be most reassuring if the Board could discover, upon reading your opinion when it appears in final printed form, that the Court—having now been informed how this situation developed—had found it possible to modify its language so as to recognize the Board's true purpose.

Very sincerely yours,

PAUL M. HERZOG,
Chairman, National Labor Relations Board.

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